84-1145

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NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THURMAN B. LANTON, Appellant

VS.

STATE OF ALABAMA, Appellee

On Appeal from the Supreme Court of Alabama

JURISDICTIONAL STATEMENT-STATE CRIMINAL CASE

SAMUEL. L. ADAMS
Attorney for Appellant
P.O. Box 1690
Dothan, Alabama 36302
(205) 792-0965

QUESTION PRESENTED

DID THE TRIAL COURT ERR IN FAILING TO GRANT APPELLANT'S MOTION FOR PHYSICAL EXAMINATION OF THE VICTIM IN A CRIMINAL CASE AND THEREBY DENY APPELLANT EQUAL PROTECTION OF THE LAW UNDER THE UNITED STATES CONSTITUTION AS PERSONS IN CIVIL CASES UNDER THE ALABAMA LAW, RULE 35 OF THE ALABAMA RULES OF CIVIL PROCEDURE, ARE ALLOWED TO REQUIRE AN OPPOSING PARTY TO BE EXAMINED PHYSICALLY IF HIS PHYSICAL CONDITION IS IN CONTROVERSY?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THURMAN B. LANTON, Appellant

VS.

STATE OF ALABAMA, Appellee

JURISDICTIONAL STATEMENT-STATE CRIMINAL CASE

CITATION TO OPINIONS BELOW

Appellant, Thurman Lanton, was arrested on a Grand Jury indictment for the charge of rape. That indictment was issued by the fall term of 1982 of the Henry County, Alabama Grand Jury. It charged Appellant, Thurman Lanton with rape in the first degree by forcible compulsion in violation of Section 13A-6-61 of the Code of Alabama and Count Two of rape in the first degree in that he did engage in sexual intercourse with a female who was less than twelve years of age. He being sixteen years or older in violation of Section 13A-6-61 of the Code of Alabama. Bond was set in the amount of ten thousand dollars which Appellant made.

Defendant, in his own person and with his attorney present, was arraigned on the indictment and entered a plea of not guilty on September 17, 1982.

On November 2, 1982, Appellant was found guilty of rape in the first degree as charged in count two of the indictment. On November 2, 1982, at the close of the State's evidence, Defendant's Motion for Directed Verdict as to Count One was granted and denied as to Count Two. On November 19, 1983, Appellant filed a Motion for New Trial setting forth various grounds, including the fact that a juror that had sat on the trial was related to the victim with the ninth degree of consaguinity.

On December 15, 1982, a report of pre-sentence investigation was filed in the case and on December 17, 1982, the Defendant was adjudged guilty of rape in the first degree as charged in count two of the indictment and was sentenced to imprisonment in the penitentiary for fifteen years. On December 17, 1982, Appellant gave notice to the Alabama Court of Criminal Appeals and bond was set in the amount of fifteen thousand dollars.

On January 3, 1983, Appellant's Motion for New Trial was granted and the Court restored the case to the trial docket and set aside the orders previously entered.

On March 30, 1983, Appellant filed a "Motion for Physical Examination" setting forth as grounds that at the previous trial, the physician who had examined the victim had testified that she could not determine whether or not the victim had engaged in sex and that the physician's speciality was not gynecology. Further, the Mo-

tion stated that Appellant would be willing to pay a reasonable charge for such an examination to be done by a competent physician. On April 8, 1983, the Motion for Physical Examination was denied.

On November 8, 1983, after trial of this cause, for the second time a jury found the Defendant guilty of rape in the first degree as charged under the indictment and Appellant was sentenced to imprisonment in the penitentiary for fifteen years. On November 8, 1983, oral notice of appeal was given to the Alabama Court of Criminal Appeals and bond was set in the amount of fifteen thousand dollars.

On December 6, 1983, Appellant filed a Motion for New Trial setting forth various grounds, including the sufficiency of the evidence and also that the Court erred in not granting Appellant's right to have the victim examined by a competent physician. On January 6, 1984, Appellant's Motion for New Trial was denied.

Various extensions were granted to the official court reporter for the filing of the transcript in this cause.

Appeal was taken to the Alabama Court of Criminal Appeals and the case was affirmed on July 17, 1984. A copy of said opinion is attached hereto as Appendix "A". Application for Rehearing was filed on July 27, 1984, and was denied on August 14, 1984, Appendix "B". Petition for Writ of Certiorari was filed with the Supreme Court of Alabama on August 27, 1984, and said Writ was denied on October 19, 1984, Appendix "C".

JURISDICTION

The jurisdiction of this Court is conferred by Title 28, United States Code, Section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment XIV, as set forth in Appendix "D".

STATUTORY PROVISIONS INVOLVED

Rule 35(a), Alabama Rules of Civil Procedure:

PHYSICAL AND MENTAL EXAMINATION OF PERSONS

(a) Order for Examination. When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in his custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

STATEMENT OF THE CASE

The first witness, Barbara Edmondson, age thirteen years, testified that she resided at Headland, Henry County, Alabama. She stated that she had known Appellant, Thurman Lanton, for several years and he had been coming to her house while her mother and daddy were gone. At the time she was approximately seven years old, Mr. Lanton started feeling of her private parts. He inserted his hand into her at that time. She told her mother about this on Father's Day of 1982. When she was twelve years old he put his private parts into hers. Barbara testified that Mr. Lanton would take her into her mother and father's bedroom where he would tell her to take off her clothes and he would put his private part into her private part.

On cross-examination, Barbara Edmondson testified that when she was in the bedroom with Appellant, he would tell her to take off her clothes and he would put his private part in her. She stated that his private part was about three or four inches. She testified that she was examined by a doctor. She stated that she did complain to the doctor about the procedure hurting. Barbara testified that Mr. Lanton was always nice to her and that she called him "Papa". On occasions he would buy groceries and bring them to her house. He would get there at approximately three thirty in the afternoon and he would take them to the store almost every Wednesday. She stated that he came down approximately every Wednesday and had sex with her.

The next witness, Mike Edmondson, testified that he was Barbara Edmondson's brother. He stated that Appellant would come to

his house during the day and would take he and his sister to buy things. He stated that on occasion Mr. Lanton and his sister would go into his mother and father's bedroom. On occasions he had been to the bedroom and tried to turn the knob of the door but was unable to and that Mr. Lanton would tell him to wait just a minute. This happened on more than one occasion. At the conclusion of Mike Edmondson's testimony, the State rested.

The State was allowed to re-open their case and they called Horace Herndon. He testified that he was a Minister at Shiloh Baptist Church and that he knew that Thurman Lanton's approximate age was sixty-five years.

At the conclusion of the State's evidence, Appellant made a Motion to Exclude.

The Defendant's testimony consisted of character testimony from Ray L. Odom. He stated that he had known Mr. Lanton for approximately fifteen years and that he knew his general reputation in the community in which he lived and that reputation was good.

Next, Johnnie Ellen Edmondson was called. She stated that she was the mother of Barbara Edmondson and that she had known Thurman Lanton since 1953. He was her brother-in-law. He is married to her husband's sister. She stated that not until Father's Day of 1982, did Barbara make any complaint about Mr. Thurman Lanton and that he had visited in her home on a number of occasions. She stated that she would arrive home at approximately five o'clock. She stated that she had never found Mr. Lanton in the bedroom with her daughter. She also stated that Mr. Lanton had on a number of occasions brought groceries and food down to her house to help her out because he was a good friend. Mrs. Edmondson testified that her mother's house was next door on approximately a one-half acre lot, not more than 110 feet from her house. During the time that Mr. Lanton was accused of having relations with Barbara, her mother did not work. Mrs. Edmondson testified that Barbara Edmondson and Mike Edmondson were Thurman Lanton's children.

The final witness for Appellant was Dr. Diana M. Mancuso who testified that she was a qualified physician. She stated that on June 24, 1982, she had an occasion to examine Barbara Edmondson. On that occasion she did a general physical examination, including a pelvic examination. She checked her blood pressure, ears, nose,

throat, neck and listened to her heart and lungs and examined her abdomen and did an examination of the external genitalia. On the examination of the external genitalia, she found that Barbara had a white vaginal discharge and some irritation of the external genitalia. She stated that she was not able to do an internal examination because Barbara was too tense. She stated that she was only able to insert her little finger a couple of millimeters or less than one-tenth of an inch. At that time she was placed on her back with her legs in the stirrups and her knees pulled apart. She could not see her hymen because Barbara was too tense and it was almost impossible to do any type of internal examination. On the time she examined Barbara, she was prepubital and was small in height, weight and had very little breast development. She did not find any tears or lacerations on the outside of Barbara. She never attempted to insert a speculum. Later, Dr. Mancuso had an opportunity to examine Barbara on July 16, 1983. On that occasion she again attempted to do a pelvic examination, but again, Barbara was too tense and it was very difficult to do any type of examination. On that occasion, she was only able to insert her little finger approximately an inch and a half into the vaginal canal. The doctor testified that she could not be sure one way or the other whether Barbara Edmondson had ever engaged in sexual intercourse.

The testimony of Mike Edmondson from the prior trial was offered wherein he stated that his father got home at approximately four o'clock in the afternoon and his mother got home at approximately five o'clock.

THE QUESTION PRESENTED IS SUBSTANTIAL

DID THE TRIAL COURT ERR IN FAILING TO GRANT APPELLANT'S MOTION FOR PHYSICAL EXAMINATION OF THE VICTIM IN A CRIMINAL CASE AND THEREBY DENY APPELLANT EQUAL PROTECTION OF THE LAW UNDER THE UNITED STATES CONSTITUTION AS PERSONS IN CIVIL CASES UNDER ALABAMA LAW, RULE 35 OF THE **ALABAMA RULES OF CIVIL PROCEDURE**, ARE ALLOWED TO REQUIRE AN OPPOSING PARTY TO BE EXAMINED PHYSICALLY IF HIS PHYSICAL CONDITION IS IN CONTROVERSY?

Appellant filed a "Motion for Physical Examination" stating that the physician who had examined the victim could not determine whether or not the victim had engaged in sex and further, he

had reason to believe that an examination by a competent gynecologist would reveal that the victim had not engaged in sex. That Motion was denied.

In civil cases, under Rule 35 of the **Alabama Rules of Civil Procedure**, any party can require an opposing party to be examined physically if his physical condition is in controversy.

This rule is "universal in its application to all civil actions." **Balfour vs. Balfour**, (Ala. CV. App.) 413 So.2d 1167

"The Equal Protection Clause requires more of a state law than non discriminatory application within the class it establishes. It also imposes a requirement of some rationality in the nature of the class singled out. To be sure, the constitutional demand is not a demand that a statute necessarily apply equally to all persons.' The Constitution does not require things which are different in fact to be treated in law as though they are the same ' Hence legislature may impose special burdens upon defined classes in order to achieve permissable ends. But, the Equal Protection Clause does require that, in defining a class subject to legislation, the distinctions that are drawn have 'some relevance to the purpose for which the classification is made."

Rinaldi v. Yeager, 384 US 305, 16 L ed 2d 577, 86 S Ct 1497

It seems that the Equal Protection Clause would require that a person who is about to lose his liberty should be accorded the same rights as one who is about to lose his money.

In the instant case, the victim had been examined by a physician who could not determine if the child had engaged in sexual intercourse in the past, and she should have been required to be examined by a competent gynecologist. A competent gynecologist can determine if a woman has been penetrated.

Jackson vs. State, 390 So. 2d 671

In view of the fact that Appellant was not allowed to have the victim examined by a competent gynecologist and her physical condition was in controversy, as he would have been afforded in a civil case this case is due to be reversed.

CONCLUSION

The question presented by this appeal is substantial and requires consideration by this Court for its resolution.

Respectfully submitted,

Samuel L. Adams
Attorney for Appellant
P.O. Box 1690
Dothan, Alabama 36302
(205) 792-0965

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APPENDIX "A"

OPINION OF THE ALABAMA COURT OF CRIMINAL APPEALS

October Term, 1983-84

July 17, 1984

4 Div. 248

Thurman B. Lanton

v

State

Appeal from Henry Circuit Court

BOWEN, PRESIDING JUDGE

Thurman Lanton was indicted and convicted for rape in the first degree in violation of Alabama Code (1975), § 13A-6-61. Sentence was fifteen years' imprisonment. Two issues are raised on appeal.

I

The trial judge did not err in denying the defendant's motion for a physical examination of the thirteen-year-old victim. "It may well be doubted, in cases of rape and cognate offenses, whether the court has the power to make an order compelling the inspection of the private person of a prosecutrix in the event of her refusal to submit to such examination. If such right exists at all, we should hold it to be a matter of judicial discretion with the trial court, to be exercised only in cases of extreme necessity, and not a subject of review on appeal to this court." **McGuff v. State**, 88 Ala. 147, 7 So. 35, 38 (1889). See generally 18 A.L.R. 3d 1433 (1968) involving a

psychiatric examination. "Although there is some authority to the contrary, it has been held that a court has inherent power, on motion of accused, to order a physician to make a physical examination of prosecutrix. It has also been held that the granting or refusal of an order for a physical examination of the prosecutrix is a matter within the discretion of the trial court, which will not be reversed except for a manifest abuse of such discretion." 75 C.J.S. **Criminal Law** § 80 (1952).

Here, the child had been examined by a physician not a gynecologist. This physician testified as a defense witness that she could not determine whether or not the prosecutrix had engaged in sexual intercourse because the victim was too tense. The defendant alleged in his motion that he "has reason to believe an examination by a competent gynecologist would reveal that said...(prosecutrix) has not engaged in sex." We do not consider this to constitute a showing of manifest or clear abuse of trial judge's discretion.

II

Although penetration is an essential element of the crime of first degree rape, an injury to the private parts of the victim is not. Evidence of injury may be used to prove penetration but it is neither essential nor necessary. Injury to the victim's private parts is merely a factor that should be considered in determining the existence or nonexistence of penetration. Annot., A.L.R.3d 163, § 7 et seq. (1977).

The judgment of the circuit court is affirmed.

AFFIRMED.

All Judges Concur.

Witness, Mollie Jordan, Clerk of the Court of Criminal Appeals of Alabama, at the Capitol this the 17th day of July, 1984.

/s/ Mollie Jordan

Clerk of the Court of Criminal Appeals of Alabama.

APPENDIX "B"

NOTICE FROM THE ALABAMA COURT OF CRIMINAL APPEALS, APPLICATION FOR REHEARING OVERRRULED

RE: CC 82-063

4th Div. 248, Henry Circuit Court

Thurman B. Lanton, Appellant

vs.

The State, Appellee

Dear Sir: This is to advise you that on August 14, 1984, the Court of Criminal Appeals announced decision of: application for rehearing overruled - No opinion, in the above stated cause.

Yours truly,
Mollie Jordan, Clerk

APPENDIX "C"

CERTIFICATE OF JUDGMENT IN THE SUPREME COURT OF ALABAMA, PETITION FOR WRIT OF CERTIORARI DENIED.

83-1329

Ex Parte: Thurman B. Lanton
PETITION FOR WRIT OF CERTIORARI

(Re: Thurman B. Lanton v. State)

CRIMINAL APPEALS 4/248

CERTIFICATE OF JUDGMENT
WRIT DENIED

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari be denied.

Costs taxed to petitioner.

JONES, J. - TORBERT, CJ., MADDOX, SHORES AND BEATTY, JJ., CONCUR.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 19th day of October, 1984.

/s/ Robert G. Esdale

Clerk, Supreme Court of Alabama

APPENDIX "D"

CONSTITUTION OF THE UNITED STATES, AMENDMENT XIV, SECTION 1.

(Citizenship Rights Not to Be Abridged by States)

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

IN THE

Supreme Court of the United States

THURMAN B. LANTON, Appellant

VS.

STATE OF ALABAMA, Appellee

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Thurman B. Lanton, the appellant above named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of Alabama affirming the judgment of conviction entered in the Circuit Court of Henry County, Alabama, entered herein on October 19, 1984.

This appeal is taken pursuant to 28 U.S.C., Section 1257 (3).

SAMUEL. L. ADAMS
Attorney for Appellant
P.O. Box 1690
Dothan, Alabama 36302
(205) 792-0965

Supreme Court, U.S.
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OCTOBER TERM, 1984

THURMAN B. LANTON,

APPELLANT

V.

STATE OF ALABAMA,

APPELLEE

ON APPEAL FROM THE SUPREME COURT
OF ALABAMA

MOTION TO DISMISS OR AFFIRM

CHARLES A. GRADDICK
ATTORNEY GENERAL

AND

GLENN L. DAVIDSON
ASSISTANT ATTORNEY GENERAL

ATTORNEYS FOR APPELLEE

250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130
(205) 834-5150

12 PM

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(205) 834-5150

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NO. 84-1145

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

THURMAN B. LANTON,

APPELLANT

V.

STATE OF ALABAMA,

APPELLEE

ON APPEAL FROM THE SUPREME COURT OF ALABAMA

MOTION TO DISMISS OR AFFIRM

The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Alabama on the ground that it is manifest that the question on which the decision of the

cause depends is so insubstantial as not to need further argument, and that the proposition upon which Appellant bases this Court's jurisdiction is entirely without foundation.

I.

THE NATURE OF THE CASE

Appellant does not challenge the validity of any Alabama statute on the ground of its being repugnant to the Constitution, treaties or laws of the United States. Instead, Appellant seeks to have his state court conviction of rape overturned on the ground that he was denied equal protection of the laws when the trial court denied his motion for physical examination of the rape victim. Criminal defendants, Appellant argues, should be afforded the same right to

require a physical examination of a party whose physical condition is in controversy, as are civil litigants pursuant to Rule 35(a), Alabama Rules of Civil Procedure. That rule, which is identical to Rule 35(a) of the Federal Rules of Civil Procedure, provides in pertinent part:

> (a) Order for examination. When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in his custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

II.

ARGUMENT

THE CASE PRESENTS NO SUBSTANTIAL FEDERAL QUESTION

Appellant argues that Rule 35(a), Alabama Rules of Civil Procedure, gives a civil litigant the right to require a physical examination of another party when that party's physical condition is in controversy. Such is not the case. As the wording of the rule clearly indicates, the court may order the party to submit to a physical examination. Whether or not an examination is ordered in civil cases in Alabama is a matter within the sound discretion of the trial court. "The trial court has a judicial discretion to exercise when presented with a motion seeking the blood group testing of the parties and of a child in a divorce case. An order for such

testing must not be routinely granted as of right, but should be carefully utilized. Balfour v. Balfour, 413 So.2d 1167, 1169 (Ala.Civ.App. 1982).

In Schlagenhauf v. Holder, 379 U.S. 104, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964), this Court held that mental and physical examinations under Rule 35(a) of the Federal Rules of Civil Procedure are only to be ordered upon a discriminating application by the district judge of the limitations prescribed by the rule, and are not to be ordered routinely.

Appellant here was afforded no less protection than civil litigants moving for physical examination pursuant to Rule 35(a). The law is clear in Alabama that the power to compel the physical examination of a prosecutrix in the event of her refusal to submit to such an examination is also a matter of judicial

discretion with the trial court. McGuff v. State, 88 Ala. 147, 7 So. 35 (1889). The trial court's denial of Lanton's motion for physical examination of the prosecutrix was an exercise of sound judicial discretion. Appellant was not denied equal protection of the laws.

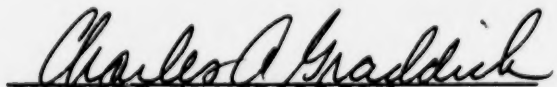
The proposition upon which Appellant bases the contention as to this Court's jurisdiction to review the judgment of the state court is entirely without foundation. This court should therefore affirm the judgment of the state court.

III.

CONCLUSION

Wherefore, Appellee respectfully submits that the question upon which this cause depends is so insubstantial as not to require further argument, and that the proposition upon which Appellant bases this Court's jurisdiction is entirely without foundation. Appellee respectfully moves the Court to dismiss this appeal, or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of Alabama.

Respectfully submitted,



CHARLES A. GRADDICK
ATTORNEY GENERAL

GLENN L. DAVIDSON
ASSISTANT ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of April, 1985, I did serve a copy of the foregoing Motion on the Attorney for the Appellant, by placing same in the United States Mail, postage prepaid.

Samuel L. Adams
Attorney for Appellant
P. O. Box 1690
Dothan, Alabama 36302

GLENN L. DAVIDSON
ASSISTANT ATTORNEY GENERAL

ADDRESS OF COUNSEL:

Office of the Attorney General
250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130
(205) 834-5150